

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs March 12, 2002

STATE OF TENNESSEE v. JEREMIAH WISEMAN

Appeal from the Criminal Court for Shelby County
No. 01-01069 James C. Beasley, Jr., Judge

No. W2001-02009-CCA-R3-CD - Filed April 22, 2002

The defendant, Jeremiah Wiseman, entered a plea of guilt to the offense of carjacking. See Tenn. Code Ann. § 39-13-404. The trial court imposed a mitigated offender sentence of 7.2 years and declared that the defendant was ineligible for probation. In this appeal of right, the defendant claims he was erroneously denied the opportunity for probation. Because the defendant should have been considered as a candidate for an alternative sentence, the judgment is reversed and the cause remanded to the trial court for a probationary hearing.

Tenn. R. App. P. 3; Judgment of the Trial Court Reversed and Remanded

GARY R. WADE, P.J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

Jake Erwin, Memphis, Tennessee, for the appellant, Jeremiah Wiseman.

Paul G. Summers, Attorney General & Reporter; Braden H. Boucek, Assistant Attorney General; and Kevin Rardin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On October 9, 2000, the defendant, age 17, used a handgun in the theft of a vehicle from the victim, Phillip Smith. After entering a plea of guilt, the defendant sought probation. The defendant's aunt, Roxanne Williams, who became his custodian after his father's death some six to seven years earlier, testified that the defendant experienced truancy problems as a juvenile but had, since this offense, conducted himself in an exemplary fashion. She stated that he had returned to school, earned a high school diploma, and begun business school.

The defendant acknowledged his guilt of the carjacking and conceded that he had used marijuana in the past, as much as "two blunts a day." He testified that he was working 35 to 40 hours per week at a barbeque restaurant owned by his brother, Kelvin Wiseman, and studying business management.

The trial court concluded that the defendant's acts were tantamount to the commission of an aggravated robbery. It noted that the only difference between carjacking and aggravated robbery was that the former involved the theft of a vehicle, as opposed to any other item. In consequence, the trial court ruled that the defendant was ineligible for probation. Otherwise, the trial judge made no findings of fact and did not consider the factors pertinent to the issue of probation: "I will allow you to pursue an appeal with regard to . . . my ruling that he's not eligible."

I

The statutory terms governing eligibility for probation are as follows:

A defendant shall be eligible for probation under the provisions of this chapter if the sentence actually imposed upon such defendant is eight (8) years or less; provided, that a defendant shall not be eligible for probation under the provisions of this chapter if the defendant is convicted of a violation of § 39-17-417(b) or (i), § 39-13-304, § 39-13-402, § 39-15-402 or § 39-13-504.

Tenn. Code Ann. § 40-35-303(a) (Supp. 2001).

The enumerated exceptions to probationary consideration are Schedule I and certain Class B felony controlled substance violations, Tenn. Code Ann. § 39-17-417(b), (i); aggravated kidnapping, Tenn. Code Ann. § 39-13-304; aggravated robbery, Tenn. Code Ann. § 39-13-402; aggravated child abuse and neglect, Tenn. Code Ann. § 39-15-402; and aggravated sexual battery, Tenn. Code Ann. § 39-13-504.

As indicated, a sentence for aggravated robbery may not be served on probation. Aggravated robbery is defined as follows:

- (a) Aggravated robbery is robbery as defined in § 39-13-401:
 - (1) Accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon; or
 - (2) Where the victim suffers serious bodily injury.
- (b) Aggravated robbery is a Class B felony.

Tenn. Code Ann. § 39-13-402.

Robbery, a Class C felony, is "the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401.

By comparison, carjacking is defined as follows:

- (a) "Carjacking" is the intentional or knowing taking of a motor vehicle from the possession of another by use of:
 - (1) A deadly weapon; or
 - (2) Force or intimidation.
- (b) Carjacking is a Class B felony.

Tenn. Code Ann. § 39-13-404.

There are well established principles in the interpretation of legislation. The words of a statute are to be taken in the natural and ordinary sense without a forced construction to limit or extend their meaning. Ellenburg v. State, 215 Tenn. 153, 384 S.W.2d 29, 30 (1964); State v. Whitehead, 43 S.W.3d 921, 928 (Tenn. Crim. App. 2000). It is the duty of the court to ascertain and effectuate the legislative intent and the purpose of the legislation. State v. Walls, 62 S.W.3d 119, 121 (Tenn. 2001). Courts must "assume that the legislature used each word in the statute purposely and that the use of the words conveyed some intent." State v. Levandowski, 955 S.W.2d 603, 604 (Tenn. 1997). It is only when the language is ambiguous that the statutory scheme must be examined to determine legislative intent and purpose. Freeman v. Marco Transp. Co., 27 S.W.3d 909, 911-12 (Tenn. 2000). Issues of statutory construction are questions of law reviewed de novo without a presumption of correctness. Walls, 62 S.W.3d at 121. Any ambiguity in a criminal statute is construed in favor of the defendant. Levandowski, 955 S.W.2d at 604.

As indicated, aggravated robbery and carjacking are separate offenses. As observed by the trial court, the only difference is that the latter involves theft of a specific class – a vehicle. Yet the plain language of the statute excludes from probation eligibility only those crimes listed in Tennessee Code Annotated § 40-35-303. The exceptions are identified by title and section, not by crime. There is no ambiguity. In this instance, the trial court imposed a sentence of less than eight years. Tennessee Code Annotated § 39-13-404, which defines the carjacking, is not excluded from probation consideration. While the nature and circumstances of the crime, a significant factor in whether to grant or deny probation, may in this instance be as serious as an aggravated robbery, trial courts are neither compelled nor authorized to perform an analysis of the crime's elements and compare them to non-qualifying offenses in order to determine whether the defendant may be considered for probation. This court must infer that the legislature was fully aware of the excluded offenses and had a rational basis for the distinction.

II

As an alternative argument, the state insists that had the trial judge considered the defendant eligible for probation, probation would not have been granted. The defendant did not address the merits of the issue in his appellate brief.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

Especially mitigated or standard offenders convicted of Class C, D, or E felonies are, of course, presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(b).

Among the factors applicable to probation consideration are the circumstances of the offense, the defendant's criminal record, social history and present condition, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978). The nature and circumstances of the offenses may often be so egregious as to preclude the grant of probation. See State v. Poe, 614 S.W.2d 403 (Tenn. Crim. App. 1981). A lack of candor may also militate against a grant of probation. State v. Bunch, 646 S.W.2d 158 (Tenn. 1983).

In Ashby, our supreme court encouraged the grant of considerable discretionary authority to our trial courts in sentencing matters. 823 S.W.2d at 171; see State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986). "[E]ach case must be bottomed upon its own facts." State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). "It is not the policy or purpose of this court to place trial judges in a judicial straight-jacket in this or any other area, and [appellate courts] are always reluctant to interfere with their traditional discretionary powers." Ashby, 823 S.W.2d at 171.

In this instance, the trial court, after concluding that carjacking was the equivalent of aggravated robbery, ruled that the defendant was not eligible for probation consideration. It never considered the merits of his claim. Because the trial judge, who sees and hears the witnesses firsthand, must be afforded considerable discretion in the grant or denial of probation, it is our view that this cause should be remanded so that there may be a full and complete analysis on the question.

Accordingly, the order denying probation is reversed and the cause is remanded to the trial court for consideration. Costs are adjudged against the state.

GARY R. WADE, PRESIDING JUDGE